UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

**GUARD PUBLISHING COMPANY**
**d/b/a THE REGISTER GUARD**
**and** **Cases** **36-CA-8743-1**
**36-CA-8849-1**
**36-CA-8789-1**
**36-CA-8842-1**

**EUGENE NEWSPAPER GUILD, CWA**
**LOCAL 37194**

## GENERAL COUNSEL'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, as amended, Counsel for the General Counsel takes limited exception to the Decision of Administrative Law Judge John J. McCarrick (JD(SF)-15-02) dated February 21, 2002 relating to his determination that Respondent did not violate Section 8(a)(1) by maintaining an overly broad Communications Systems Policy. In particular, General Counsel takes exception to the following:

1. To the Judge's finding at JD7:5-32 that the Communications Systems Policy is not a facially overbroad no solicitation rule.

DATED at Portland, Oregon, this 10th day of April 2002.

Adam D. Morrison
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601 S.W. 2nd Ave., Rm. 1910
Portland, OR 97204

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## GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

### 1. STATEMENT OF THE CASE

The portion of this case that General Counsel takes exception to involves Respondent's maintenance of an overly broad Communications Systems Policy (CSP). The undisputed facts established that Respondent implemented its CSP on or about October 4, 1996 (G.C Ex. 2; T. 45).[1] It is also undisputed that Respondent has continuously maintained that policy since its implementation in 1996 (T. 45). The CSP applies to all communication equipment including telephones, computers and the electronic mail (e-mail) system (GC. Ex. 2). In sum, the CSP prohibits all non-business

[1] References to the Record will be made as follows: Reference to the Transcript will be designated as (T. __), references to the General Counsel's Exhibits will be designated as (G.C.Ex. __) and references to the Administrative Law Judges decision will be designated as (JD__:__).

uses on Respondent's communication systems, including such communications protected by Section 7 of the Act.[2]

2. ARGUMENT IN SUPPORT OF THE EXCEPTION

Counsel for the General Counsel respectfully disagrees with the Judge's determination that Respondent's CSP is not unlawfully overbroad as it limits non-business e-mail. Respondent's prohibition of all non-business use of e-mail is overbroad and facially unlawful since it prohibits at least some communication that is protected by Section 7. While there is no Board law specifically addressing Respondents' prohibition of all non-business e-mail messages, there is ample Board law addressing the legality or illegality of prohibitions on workplace communication. While e-mail is relatively new in the workplace, communication policies are not. E-mail clearly falls within the framework of workplace communication and as such should be consistent with existing Board law on point.

a. Solicitation vs. Distribution

The starting point for analysis of this issue must begin with the Board and Supreme Court's line of cases involving no-solicitation and no-distribution policies. The law on point is exemplified in the decisions of *Republic Aviation Corp.*[3] (solicitation) and *Stoddard-Quirk Mfg. Co.*[4] (distribution).

In *Republic Aviation*, the employer discharged an employee for handing out union cards inside the plant during non-working times. The employer had a policy that

[2] The ALJ found that Respondent violated Section 8(a)(3) and (1) of the Act by disparately and discriminatorily applying the CSP against Union President Suzanne Prozanski because Respondent routinely allows every other personal and non-business use of e-mail. *See* JD9:23-24.
[3] 324 U.S. 793 (1945).
[4] 138 NLRB 615 (1962).

prohibited all solicitation inside the plant at any time. The Supreme Court held this policy to be overbroad.[5] *Republic Aviation* established the rule that while employers may prohibit solicitation during working times, there is a rebuttable presumption of illegality when an employer maintains a policy that prohibits such solicitation during non-working times.[6] Such a policy would be tantamount to cutting off all Section 7 communication in the workplace.

In *Republic Aviation*, the Court struck a balance between the employer's right to have an efficient workplace and the employees' Section 7 rights. In striking this balance, the Court stated that "[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."[7]

In contrast, the Board established a different rule for no-distribution policies in *Stoddard-Quirk*. In *Stoddard-Quirk*, the employer discharged an employee for passing out literature in the employer's parking lot in violation of the employer's no-distribution policy. The case is often cited for the simple proposition that an employer may limit the distribution of printed materials in work areas because of a presumed legitimate concern regarding the potential for litter. However, the decision is more expansive than that. In deciding *Stoddard-Quirk*, the Board examined the effect of such a policy on the employees, not just the effect to the employer. The Board held that unlike oral solicitation, the permanent nature of written material allows the communication to be read and reread at the receiving employee's convenience. The purpose of distribution, unlike solicitation, is achieved so long as the employee receives the literature.

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[5] *See Republic Aviation*, 324 U.S. at 805.
[6] *See id.* at 803-04.
[7] *Id.* at 802 n.8.

With the *Stoddard-Quirk* decision, the Board drew a distinction between solicitation and distribution. The distinction focuses on the nature of the communication. Where the communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation. Where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution.

This distinction is best exemplified in the Board's characterization of the circulation of authorization cards and decertification petitions. The Board characterizes both of these activities as solicitation rather than distribution.[8] Although both examples involve the circulation and distribution of pre-printed forms, the activity of collecting signature involves more activity than merely passing out the forms. The activity itself promotes dialog and discussion and as such, the Board characterizes these actions as solicitation rather than distribution.

b. E-mail: Solicitation or Distribution

The evidence established that the Respondent's employees use computers and e-mail in such a way as to make them "work spaces" within the meaning of *Republic Aviation* and *Stoddard-Quirk*. Several employees testified that they use e-mail as an integral part of daily work routine (T. 74; T. 164; T. 216; T. 272; T. 291; T. 314). Employees at the Register Guard use e-mail for such purposes as contacting sources (T. 292), sending and receiving their articles both to the public and to their editors (T. 292) and even conversing with co-workers over such casual topics as gathering for a beer after work or scheduling a poker game (T. 165). Prior to the

[8] *See, e.g.*, Rose Co., 154 NLRB 228, 229 n.1 (1965); Southwire Co., 145 NLRB 1329 (1964).

introduction of e-mail, employees performed these tasks by direct, face-to-face contact (T. 76; T. 166; T. 218; T. 274; T. 297). E-mail, to a large extent, has replaced face-to-face communication. The computer and e-mail have become inextricably intertwined with the physical space these employees occupy and, as such, are "work areas" within the meaning of *Republic Aviation* and *Stoddard-Quirk*.

E-mail, as a communication form, is much more akin to solicitation than distribution. E-mail, unlike a flyer, invokes a spontaneous response and often initiates reciprocal conversation. E-mail is instantaneous and often there are several exchanges in the span of a few seconds. "Like speech, e-mail is often informal and individually targeted. But even where an initial message is neither informal nor personalized, it is still not merely equivalent to a flyer because e-mail allows the reader to talk back."[9] A Florida court characterized e-mail as "a substitute for telephonic and printed communications, as well as a substitute for direct oral communication."[10]

c. Overbreadth

The ALJ correctly classified e-mail as solicitation in his Decision (JD7:24-32). Therefore, the only remaining question is whether the CSP is facially overbroad. Since e-mail is "work space" within the meaning of the Act and since the ALJ correctly identified e-mail as solicitation, the lawfulness of the CSP must be analyzed under the framework of *Republic Aviation*. Under *Republic Aviation*, there is a rebuttable presumption that maintenance of a communications policy that prohibits workplace communication during non-working times is illegal. This presumption of unlawfulness

[9] **Elena N. Broder, Note, "(Net)workers' Rights: The NLRA and Employee Electronic Communications," 105 Yale Law Journal 1639, 1662 (1996).**
[10] **In re Amendments to Rule of Judicial Administration, 651 So. 2d 1185 (Fla. Sup. Ct. 1995).**

may be overcome if the employer can demonstrate that the restrictions are necessary to maintain production or discipline.

Not only did Respondent fail to demonstrate that the CSP is necessary to maintain production or discipline, but the Record in this case is filled with examples of non-business use of e-mail used on non-work time (for example, see T. 74; T. 164; T. 216; T. 272; T. 291; T. 314) without adverse effect on production or discipline.[11] Since Respondent did not present any credible defense for such an overly broad CSP, Respondent's CSP violates Section 8(a)(1) of the Act.

3. CONCLUSION

Respondent's CSP prohibits all non-business use of the e-mail system. Clearly, some of the prohibited non-business e-mail includes union-related solicitation messages protected by Section 7. The CSP also applies at all time of the employee's workday, including non-working times (i.e., during lunch, during breaks and before and after work). Because Respondent present no credible defense or need for such a far reaching communications policy, its CSP is overbroad and facially unlawful and clearly violates Section 8(a)(1) of the Act.

DATED at Portland, Oregon this 10th day of April 2002.

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[11] *See* JD8:48-49 (the ALJ found that when the Respondent "permitted a plethora of non-business uses of e-mail, [it] cannot validly prohibit e-mail dealing with Section 7 subjects").

## CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April 2002, copies of **General Counsel's Exception to the Administrative Law Judge's Decision and General Counsel's Brief in Support of its Exception to the Administrative Law Judge's Decision** were served by Federal Express and regular mail on the following parties:

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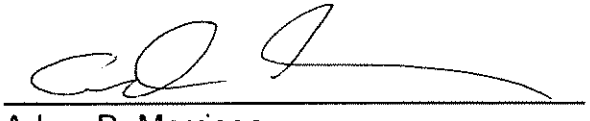

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